UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TT & W FARM PRODUCTS, INC. d/b/a HEARTLAND CATFISH COMPANY, INC. and HEARTLAND ALABAMA, LLC,

Respondent,

and **Case No. 26-CA-23722**

TONEY WILLIAMS, AN INDIVIDUAL,

Charging Party.

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

COMES NOW TT&W Farm Products, Inc. d/b/a Heartland Catfish Company, Inc. and Heartland Alabama, LLC (hereinafter "Company", "Respondent" or "Heartland") and files this Brief in Support of Its Exceptions to the Administrative Law Judge's Decision, in the above captioned case.

I. STATEMENT OF THE CASE

On August 11, 2010, Region 26 of the National Labor Relations Board ("NLRB" or "Board") issued a Complaint and Notice of Hearing based on a charge filed by Toney Williams, an individual, alleging that the mere existence of several rules in the Employer's handbook were, on their face, illegal. The rules in question fall into five (5) categories: (1) an alleged improper no-solicitation/distribution rule, (2) various rules prohibiting employees from leaving their work stations without permission from management or engaging in interruptions of work, (3) a rule against disparaging remarks, (4) removing classified or proprietary information from the plant,

and (5) "bearing false witness for or against the Company." **(JM Appendix 3)**[1] On August 11, 2010, the Respondent filed a timely Answer denying that the rules in question violated the National Labor Relations Act ("Act"). On August 9, 2010, Region 26 issued an Amendment to Complaint and Notice of Hearing to correct omitted paragraphs from the original Complaint. The Employer filed a timely Answer to the Amended Complaint on August 13, 2010. **(JM Appendix 5 and 6)**.

Thereafter, the case was submitted to the Judge's Division pursuant to a Joint Motion for Issuance of a Decision Based Upon the Waiver of an Evidentiary Hearing and Approval of Detailed Stipulation of Facts, under Section 102.35(a)(9) of the Board's Rules and Regulations. On December 21, 2010, Administrative Law Judge Robert H. Giannasi issued a Decision in this matter finding that the Company maintained an unlawful no-solicitation/distribution rule prohibiting distribution of handbills or similar literature relating to the solicitation of tickets or contributions, that the Company's various rules regarding interruption of work and leaving one's workstation without permission were unlawful, and that the Company's rule prohibiting bearing false witness for or against the Company violated the Act. The Respondent's excepts to these findings and conclusions of law and submits that the Board must reverse the Administrative Law Judge's decision regarding these three (3) classifications of rules.[2]

II. BACKGROUND

Respondent operates facilities in Itta Bena, Mississippi and Greensboro, Alabama where it is engaged in the business of catfish processing and sales. The employees at the Respondent's

[1] References to the Administrative Law Judge's decision will be referenced by "ALJ", followed by the appropriate page number(s). References to the Appendices in the Joint Motion for Issuance of a Decision Based upon the Waiver of an Evidentiary Hearing and Approval of Detailed Stipulation of Facts will be designated by "JM" followed by the appropriate appendix number. References to the Stipulation of Issue and Facts will be designated by "Stipulation" followed by the appropriate number(s).

[2] The Administrative Law Judge's Decision correctly dismissed the allegations regarding Respondent's "non-disparagement" rule and the non-revelation of classified or proprietary information policy **(ALJ 8-9 and 10-11)** and the Employer does not except to or appeal these dismissals.

Mississippi and Alabama facilities work on an assembly line which begins with live catfish being received and ends with the shipment and storage of catfish fillets. The Mississippi facility processes approximately 300,000 pounds of catfish per day and the Alabama facility processes approximately 200,000 pounds of catfish per day. At both locations, the assembly line consists of numerous stations where the fish are weighed, sized, de-headed, skinned, filleted, trimmed and ultimately packaged and labeled. There are approximately 460 employees at the Mississippi facility and 190 employees at the Alabama facility. **(Stipulation No. 2, 3, 4 and 5, JM Appendix 9; ALJ 2)**.

All of the rules in issue are contained in employee handbooks at the Mississippi and Alabama facilities. These handbooks are essentially identical and have been in use at the Mississippi facility since at least March 20, 2008, and at the Alabama facility since September 2008. **(Stipulation No. 6 and 9, JM Appendix 9; Joint Exhibits A and C; ALJ 2)**.

Based on the Stipulated Record, the only evidence that any of the employees in question have actually seen or read even the employee handbooks and rules in issue occurred when they were first hired by Respondent. Specifically, during the orientation period for new employees, the handbook is discussed with all new hires. Thereafter, the handbook is returned to the Respondent where it is maintained in the Human Resource Department at Respondent's Mississippi and Alabama facilities and only made available to employees upon request for review. **(Stipulation No. 7 and 10, JM Appendix 9; ALJ 2-3)**. There is absolutely no record evidence that any of the Mississippi or Alabama employees have ever requested to review the handbook following their orientation period and there is absolutely no evidence that these handbooks, or the rules contained therein, have ever been distributed to employees or posted at the facilities. The only issue presented for adjudication in this matter is whether the mere

existence of these rules in the employee handbook violates the Act. There are no allegations of Section 8(a) (3) violations in this matter, nor are there any allegations that Respondent unlawfully or discriminatorily enforced any of the work rules in issue. Further, none of the handbook rules in questions were promulgated in response to any union organizing activity. **(Stipulation No. 1, 23 and 24, JM Appendix 9; ALJ 5).**

III. ARGUMENTS AND AUTHORITIES

A. General Authorities

In cases where the mere existence of a rule is being challenged, the Board is required to give the challenged rule "a reasonable reading." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where a rule does not "*explicitly*" restrict activities protected by Section 7, and none do in this instance, there cannot be a violation unless "(1) employees can *reasonably* construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (emphasis supplied). There is no dispute with regard to the latter two elements, as demonstrated in the stipulated facts. Heartland did not promulgate these rules in response to union activity nor has any rule in issue been enforced to restrict an employee's exercise of his/her Section 7 rights. **(ALJ 5).**

In addition to the requirement of giving each rule a reasonable reading, it is not permissible to read selected phrases in isolation nor is it permissible to presume any rule improperly interferes with an employee's protected rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). When viewed in conjunction with the handbooks as a whole, as opposed to

being read in isolation, the only rational and reasonable interpretation of the rules in issue is there has been no impingement of an employee's protected rights.

B. Absence of Evidence that any Heartland Employee has a Present Day Recollection, Understanding or Knowledge of Any of the Rules in Question.- Exception Nos. 6, 7 and 8

As indicated above, all of the challenged rules are only located in the employee handbooks which are only discussed with employees at the time of their hire during their orientation. Following this orientation, the handbooks are returned to the Company—the rules are not posted or otherwise distributed to employees. **(ALJ 2-3)**. Following the orientation period, employees would only have the opportunity to again view the handbooks, including the rules in question, upon specific request and there is absolutely no record evidence in this case that any employee has ever requested to see the handbook beyond their orientation.

The handbooks themselves are 26 pages long, single spaced. **(Joint Exhibits A and C)**. Respondent submits that it strains credulity to believe that any of its employees could remember word for word all of the provisions in the handbooks in question absent a photographic memory—and there is no record evidence of any employee with such a photographic memory. Simply stated, this case is unusual in that the alleged improper rules are not "in the face" of the employees in question. While many companies post their rules and policies or actually distribute copies of the rules and policies to their employees, Heartland does not. Accordingly, under the unusual facts in this case, there is absolutely no record evidence to support any assumption or conclusion that any Heartland employee has a present day recollection, knowledge or understanding of any of the rules being challenged by Counsel for the Acting General Counsel, including the charging party.[3] As a result, there can be no finding that any of the rules in issue

[3] The Employer requests that the Board take judicial/administrative notice of the fact that the Charging Party in this matter, a former employee of Heartland, initially filed an unfair labor practice charge with Region 26, Case No. 26-

could be "reasonably construed by employees" as limiting or impacting their right under *Lafayette Park Hotel, supra,* since the evidence shows no employee present day recollection of the rules.

The Administrative Law Judge discounted this fact by noting that each employee was required to sign an acknowledgment that he or she was responsible for abiding by the rules in the handbook and by commenting "surely, respondent is not contending that the rules in the handbook do not apply and that it cannot penalize employees for violating the rules simply because the employees do not know about the rules or do not see the handbook since they were first hired, nor does the handbook state that the employees are excused from following the rules because they did not know about them or did not see the rules since they were first hired." **(ALJ 7)**. These findings/comments miss the point.

The issue under established law is "can employees reasonably construe the language of a rule to prohibit Section 7 activity?" Under the unusual facts in this case, there is absolutely no record evidence that the employees even have a present day recollection of the rules themselves and thus, there can be no finding that the employees could reasonably construe such language to prohibit Section 7 activity. As in the movie "Animal House" when the fraternity was put on "double secret probation" they had no knowledge that such a status existed, and thus could not have been "coerced" by this unknown situation. This case does not involve whether the Respondent could possibly "penalize employees" with respect to the rules in question or if Heartland "excused" employees from following the rules in question—the Respondent's

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CA-23651 on February 10, 2010, alleging improper discharge under attendance rules that are not among the rules being challenged in this case. It was only after the Respondent tendered it's handbook in defense of this earlier charge and the subsequent withdrawal of the charge in 26-CA-23651 on April 15, 2010 that the charge in the present matter was filed on April 22, 2010, after the tender of the handbook in issue. This series of events clearly indicates that even the charging party did not remember or have knowledge of any of the rules in question during his employment prior to the Respondent's submission of its employee handbook to Region 26 in response to the earlier charge, which did not contain any allegations concerning the rules at issue.

argument is simply that under the highly unique facts of this case, there is no evidence that any of the employees even have a present day knowledge or recollection of the rules in question and therefore, it is impossible for those employees to "reasonably construe" such unknown rules so as to prohibit their Section 7 activities under *Lafayette Park Hotel, supra.* For this reason, all of the findings of unlawful rules must be reversed as there is simply not any evidence of record to show that employees have a present day recollection of the rules in question and thus they cannot be said to have reasonably believed these unknown–to them- rules impacted their Section 7 rights.

C. The Specific Rules at Issue

1. No-Solicitation/Distribution Rule Exceptions Nos. 1 to 11 and 24 to 28

The Administrative Law Judge found that the list of "major offenses" which could be considered cause for discharge on page 22 of the employee handbooks contains an improper no-solicitation/distribution rule in violation of the Act. **(ALJ 6)**. Specifically, the challenged rule prohibits "unauthorized selling or distributing of tickets, soliciting contributions or distributing handbills or similar literature on Company property at any time". **(Stipulation No. 20, JM Appendix 9; Exhibits A and C, page 22; Complaint ¶6 (e), JM Appendix 3; ALJ 6)**. The Administrative Law Judge is incorrect. This is not the Employer's no-solicitation/distribution rule and this rule reasonably pertains only to "selling tickets or soliciting contributions" which the Employer has the legal right to prohibit at any time on Company property.

The Respondent's no-solicitation/distribution rule which would be applicable to employees' Section 7 rights appears prominently on page two (2) of the handbooks. This rule, entitled "Non-Interference with Work" reads as follows:

> "Working time is for work. There will be no solicitation of any kind and no distribution of literature of any kind by any employee during work time. You should accomplish your work and not interfere with other employees trying to accomplish their work. Work time does not include the time before your scheduled work day begins, time after you have completed your scheduled work day, or your break and lunch periods. Employees are not permitted to engage in the distribution of advertising material, literature and other non-work materials at any time in work areas. Persons not in the employ of the Company will not be permitted to make solicitations or distributions of any kind on plant property at any time."
> **(Stipulation No. 13, JM Appendix 9; Joint Exhibits A and C, page 2).**

This is a legal and proper no-solicitation/distribution rule under the National Labor Relations Act and does not violate employees' Section 7 rights in any manner. *Funk Mfg. Co.*, 301 NLRB 111, 111 (1991). Contrary to the ALJ's finding that the above rule does not address "what can or cannot be done on company property" **(ALJ 7)**., the rule on page 2 of the handbook specifically addresses the distribution of non-work related materials "in work areas."

The language in the rule on page 22 of the handbooks on its face can only be interpreted as applying to distributing of "tickets" or "soliciting contributions"—both activities of which the Employer has the right to prohibit at any time—and the language concerning the distribution of "handbills and similar literature" clearly relates back to that distribution of "tickets" or "soliciting contributions". This is a legal and proper rule. *N. L. R. B. v. Mock Road Super Duper, Inc.*, 393 F.2d 432, 435 (6th Cir. 1968) (holding that in the absence of showing that an application of rule to prohibit union solicitation had been made or contemplated, mere presence of rule proscribing soliciting in any form on store premises and providing that "raffles, pools, collections for any purpose, or the sale of tickets or merchandise, either by employees or outsiders, may not be conducted without the express provision of the store manager" did not constitute a violation of the National Labor Relations Act.); *Children's Center for Behavioral Development*, 347 NLRB 35, 37 (2006) (finding broad no-solicitation policy that was applicable

to "all staff, makes no distinction for regular duty hours or break time, and applies to all of the Respondent's property" did not violate Section 8(a)(1) because it "expressly targets personal commercial business, rather than concerted protected activity, and accordingly would not reasonably tend to chill the exercise of employees' Section 7 rights.").

The Administrative Law Judge, however, found, based on a grammatical conclusion, that the language prohibiting the distribution of handbills or similar literature did not relate back to the selling and distribution of "tickets" or "soliciting contributions" because the rule does not specifically state that the prohibition is selling/distributing tickets/contributions "by" handbilling or similar literature. The Judge also improperly parses this rule to contend that it is three distinct types of conduct – selling or distributing tickets, soliciting contributions and distributing handbills/similar literature. **(ALJ 6)**. This is incorrect. The rule clearly is designed to prohibit "unauthorized selling or distributing of tickets/solicitation of contributions" and the alleged offending language relates to "handbills or similar literature" which clearly relates back to the ticket/contributions. Again, the Respondent maintains a lawful no-solicitation/distribution rule prominently featured on page 2 of the handbook – the rule in question challenged by General Counsel and held to be illegal by the ALJ is a completely separate prohibition which is solely designed to prohibit commercial activities of selling tickets or soliciting contributions under a plain reading of the rule.

Clearly, in light of the lawful and proper no-solicitation/distribution rule prominently featured on page two (2) of the handbooks, employees could not reasonably construe the language of the rule in issue on page 22 of the handbooks to prohibit Section 7 activity—but only commercial ventures such as selling tickets or soliciting monetary "contributions". Again, there is absolutely no evidence that any employees have ever been disciplined or that the

Employer has unlawfully or discriminatorily enforced the rule challenged and there is absolutely no record evidence that any of the employees at either facility have actual knowledge of the existence of this rule under the peculiar circumstances in this case. For the above reasons, the Administrative Law Judge's findings and conclusions of law regarding the above referenced rule must be reversed and Paragraph 6(e) of the Complaint regarding the challenged no-solicitation/distribution rule must be dismissed.

2. Leaving Work Station without Permission and Interfering With Work Exception Nos. 1, 6 to 8, 12 to 15 and 24 to 28

Next, the Administrative Law Judge held that four (4) different sections of the employee handbooks which refer to Company policy that employees should notify and receive permission from members of management before leaving their assembly line work stations during working time were unlawful -- Complaint ¶6(b) ("You are expected to be at your work station during working hours and you should obtain permission from your supervisor or the plant manager before leaving the work station or plant"), Complaint ¶6(c) ("Leaving the plant without your supervisor/group leader's permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit"), Complaint ¶6(d) ("Leaving your work station without permission or approval will be considered cause for disciplinary action"), and Complaint ¶6(f) ("Walking off the job or leaving the plant without permission or notifying the supervisor will be considered for immediate discharge")). **(JM Appendix 3; Stipulation No. 15, 18 and 21, JM Appendix 9; Joint Exhibits A and C; ALJ 9-11)**. In addition, the Administrative Law Judge held that a rule in the employee handbook prohibiting "engaging or participating in any interruption of work" impermissibly impacts employees' Section 7 rights

(Complaint ¶6(f), Item 14, JM Appendix 3; Stipulation No. 21(c), JM Appendix 9; Joint Exhibits A and C, page 22, 23; ALJ 9-10).

The Administrative Law Judge's finding that the above rules are unlawful or violate employees' Section 7 rights is unsupportable. Clearly, the passages about leaving a workstation on their face are limited to situations when an employee leaves his/her station or plant unannounced when he/she is supposed to be working and is intended to avoid disruption of and burdening other workers on the assembly line. It is not unreasonable nor a violation of the Act to require an employee to inform his/her supervisor of any intended departure while he/she is on the clock. Instead, it is a sound management practice and absolutely necessary in order to run an efficient, safe and profitable business operation. Safety is clearly an issue on a massive fish processing assemble line. Should an employee be required to leave their job or plant for any reason, he/she need only ask as is permitted by the handbook. **(Stipulation No. 22, JM Appendix 9; Joint Exhibits A and C, page 24).**

There is no conceivable way that any of the rules in question could be reasonably construed to apply to or prohibit concerted activity by employees under Section 7 of the Act. This is clearly demonstrated by the communication procedure contained in both employee handbooks, which states there will be no retaliation for employee activities that would constitute concerted action:

> It is the Company's sincere belief that the prompt and effective use of a problem solving procedure can help maintain the harmonious relations which everyone so strongly desires. It has been and always will be the policy of the Company to listen and give full attention to every employee. **There will be no retaliation against anyone for his or her part in the presentation of a complaint, suggestion or question** and, if the employee so requests, such complaint, suggestion or question will be handled as confidentially as possible...**We encourage you to seek solutions to any concerns you have at those levels of supervision closest to you but in the event they are not or cannot be resolved by**

<u>your supervisor/group leader, we want you to feel free to talk with any member of management that you feel comfortable with.</u>
(Stipulation No. 22, JM Appendix 9; Exhibits A and C, page 24).

There is absolutely nothing in any of the rules in this category which "explicitly" restricts or applies to employees' protected concerted activities. Instead, as properly noted on page one (1) of both handbooks: "The policies that are set forth in this handbook may have to be changed from time to time out of necessity...these policies and procedures reflect the way we will handle <u>ordinary matters</u> concerning your employment with the Company. Your supervisor/group leader will answer any specific questions you have about these policies and procedures and will be glad to help you in any way that he or she can." Similarly, the language on page eleven (11) of both employee handbooks advises the employees that "written rules or policies cannot cover all conduct which may be expected of employees...in deciding the discipline to be imposed, consideration will be given to the facts of the particular case" and that the policies contained in the handbooks will merely "be used as a general guide". **(Stipulation No. 12, 16, 17, JM Appendix 9)**. By it's very nature "concerted activity" requires some "communication" by employees of a work related dispute to management, and in this event, pursuant to the above referenced sections of the handbooks, there no reasonable belief created by the challenged sections that the Respondent would do anything other than obey the law and "not retaliate" in the face of the concerted activity.

Respondent submits that virtually every company in America has similar rules prohibiting employees from simply wandering away from their work station any time they so choose. Respondent recognizes its obligation to not discriminate or take adverse action against employees engaged in protected concerted activity and, pursuant to the aforementioned policy guidelines in the employee handbooks would never discipline, terminate or consider an

employee to have voluntarily quit for engaging in protected concerted activity. Again, there is absolutely no evidence that any of the rules in question in this category have been so applied or enforced.

In *SMI Steel, Inc.*, 286 NLRB 274 (1987), an ALJ found that the employer's enforcement of an employee handbook provision requiring that employees get permission before leaving their work area unduly restricted employees in the exercise of their Section 7 rights and violated Section 8(a) (1) in light of "credible testimony" that before the union activity began, "employees did not need permission to leave their work area." *Id.* at 289. The ALJ then entered a recommended Order requiring the employer to cease and desist from "prohibiting employees from leaving their work areas without permission contrary to past practices." *Id.* The employer objected to the ALJ's decision on the grounds that it failed to take into account the "practicalities of safety in a dangerous workplace." *Id.* at 274. After the employer objected, the Board modified the ALJ's recommended Order, stating that it agreed with the employer that "the judge's recommended Order, as written, might restrict future lawfully motivated changes in the [employer's] practices regarding permission to leave the work area." *Id.* Accordingly, the Board modified the ALJ's recommended Order and required the employer to "cease and desist from *discriminatory enforcement* of its rule regarding leaving the work area with the purpose of restricting employees in the exercise of their Section 7 rights." *Id.* at 275 (emphasis added). Significantly, the Board did not find the rule itself was a *per se* violation of Section 8(a) (1).

Again, the Employer's operation is an assembly line where employees are using various sharp implements to process hundreds of thousands of pounds of catfish a day. The rule in question is only designed to ensure the safe and efficient operation of this assembly line. In *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated on other grounds, 345 NLRB 1050

92005), reversed and remanded sub. nom. *Jochims v NLRB*, 480 F.3d 1161 (D.C. Cir. 2007), the Board found that the employer's handbook rule prohibiting employees from "[a]bandoning your job by walking off the shift without permission of your supervisor or administrator," did not violate Section 8(a) (1) of the NLRA. In explaining its decision, the Board noted that the employer operated a nursing home with "many elderly patients who are sick or infirm" and that "[c]onsidering the rule in this context, we find that employees could not reasonably read the rule as prohibiting them from engaging in all strikes or similar protected concerted activity." Instead, the Board found that "in context, employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday." In our case, notification to management is simply necessary for the assembly line to continue operations and no reasonable person could believe the rule in issue prohibited them from concerted activity.

Again, there is absolutely no record evidence of any discriminatory enforcement of any of the rules at issue in this category. Attendance and remaining at one's work station during work time is absolutely is absolutely critical in an assembly line operation such as the Employer's Mississippi and Alabama facilities. Attendance is stressed throughout the employee handbooks. **(Stipulation No. 14, 18, JM Appendix 9; Joint Exhibits A and C, page 14, 18, 19)**. To misread the rules in question or any attempt to eliminate these rules would result in industrial anarchy and give employees, not just at the facilities in question but nationwide, the right to wander away from their jobs with impunity even in the absence of concerted activity protected by the Act. This is not required or permitted by the law and cannot be sanctioned. Again, none of the rules in question explicitly restrict Section 7 activities and are limited to situations where employees leave their station unannounced when they are supposed to be

working. Neither the rules themselves nor the record demonstrate that they would applicable to concerted action rights under Section 7. For all of the above reasons, the Administrative Law Judge's decision on these rules must be reversed and paragraphs 6(b), 6(c), 6(d), and 6(f) of the Complaint must be dismissed.

Next, the rule prohibiting "engaging or participating in any interruption of work" reads as follows:

> Willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or engaging or participating in any interruption of work".
> **(Joint Exhibits A and C, pages 22, 23)**.

The phrase "engaging or participating in any interruption of work" must be read in the context of the entire provision, which is clearly limited to non-protected activities. The NLRA does not protect an employee who willfully restricts production (i.e. deliberate slowdowns) of his/her employer nor does an employee have the right to interfere in the performance of work by other employees. *Daimler-Chrysler Corp.*, 344 NLRB No. 154, 178 LRRM 103 (2005); *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir.1965). Further, interfering with another employee who is trying to perform his/her job on the assemble line in question involving the cutting and processing of fish is a legitimate safety concern. The rule is reasonable and consistent with the law and cannot be interpreted any other way.

Again, there is no evidence that the Employer has unlawfully or discriminatorily enforced the provision in question to prohibit Section 7 activity. Further, the prohibition clearly applies to "working time" and this provision must be read in conjunction with the Company's lawful no-solicitation/distribution rule discussed above in this Brief. For the foregoing reasons, the Administrative Law Judge's decision on this rule must be reversed and paragraph 6(f), item 14 of the Complaint must be dismissed.

3. Bearing False Witness For or Against the Company Exception Nos. 1, 6 to 8, and 16 to 28

The Administrative Law Judge found that the Employer's employee handbook rule prohibiting "bearing false witness for or against the Company under any and all conditions" is improper and somehow restricts activities protected by Section 7. **(ALJ 11; Complaint ¶6 (f) item 13, JM Appendix 3; Stipulation No. 21, JM Appendix 9; Joint Exhibits A and C).** This position is untenable.

The word "lie" does not appear in this rule. The words "bear false witness" is a term-of-art. Black's Law Dictionary, Revised 4th edition (1968) defines the act of bearing "false witness" as "one who is intentionally rather than merely mistakenly false". *State v. Weston*, 109 Or. 19, 219 P. 180-189." The Administrative Law Judge found that this reference to Black's Law Dictionary was not persuasive as "an employee who does not read Black's Law Dictionary and does not deal in the subtleties of legal technicalities would make that distinction – i.e., intentionally lying rather than mistakenly false." Perhaps the ALJ is correct that most employees have not read Black's Law Dictionary – however, virtually all of today's employees have access to the internet. Even a short review of the term "bearing false witness" on the internet supports the Employer's contention: Wiki.Answers.com – bearing false witness means "Swearing you know something when you know it is untrue;" www.thefreedictionary.com – the term false witness is "a person who deliberately gives false testimony;" dictionary.reference.com – false witness is "a person who deliberately gives false testimony [syn: perjurer]." Clearly, a Company's policy prohibiting "intentional lying" cannot under any circumstances be found to violate an employee's Section 7 rights under the Act. Importantly, this policy prohibits bearing false witness either **for** or against the Company. The only literal meaning of this rule is to simply advise employees that they are not to intentionally lie.

Although there are Board decisions supporting the argument that employees cannot be prohibited from making statements that are disparaging or merely inaccurate – **knowingly** false statements or statements made with **reckless disregard** for whether they are true are false are not protected by the NLRA. It is not a protected right under the NLRA for an employee to knowingly or recklessly propagate lies or misleading statements. *See Sprint/United Management Co.*, 339 NLRB 1012 (2003) (adopting ALJ decision finding that employee who sent email containing statements that were found to be either deliberately false or made without regard for their truth or falsity was not entitled to protections of NLRA even though statements related to terms and conditions of employment); *KBO, Inc.*, 315 NLRB 570 (1994), enfd. 96 F.3d 1448 (6th Cir. 1996) (recognizing that statements made with knowledge that they are false or with reckless disregard of whether they are true of false not protected under NLRA). Clearly, Heartland's rule prohibiting employees from "bearing false witness for or against the Company," is aimed at knowingly false statements, which are not protected by the NLRA. No reasonable employee could read this rule as a prohibition on the exercise of Section 7 protected rights.

The cases cited in the Administrative Law Judge's decision involve rules that are far broader than Heartland's narrow rule barring employees from "bearing false witness" for or against the company. *See Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (finding rule barring employees from "Making false, vicious, profane, or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees" violated Section 8(a)(1)); *Mission Foods*, 350 NLRB 336, 344 (2007) (affirming ALJ decision finding that rule prohibiting employees from "[m]aking false, vicious or malicious statements concerning any employees, the company, or its products and services."); *Spartan Plastics*, 269 NLRB 546, 552 (1984) (affirming ALJ decision that rule against "making or publishing any false, vicious, or malicious statements concerning

any employee, supervisor, the Company, or its products" violated Section 8(a)(1)); *Tawas Indus.*, 321 NLRB 269, 276 (1996) (finding provision of collective bargaining agreement prohibiting "false, vicious, or malicious statements concerning" the employer violated section 8(a)(1)).

All of the rules in the decisions cited by the Administrative Law Judge prohibit employees from making not only "false" statements but also "vicious" and "malicious" statements. Because Heartland's rule against "bearing false witness" is aimed at prohibiting knowingly false statements which are not protected by the NLRA, these cases are inapposite and Heartland's rule does not violation Section 8(a) (1).

No reasonable employee could interpret this provision as anything other than prohibiting perjury – which is likewise prohibited by state and federal laws. As a result, the Administrative Law Judge's decision on this issue must be reversed and paragraph 6(f), item 13 of the Complaint must be dismissed.

IV. CONCLUSION

For the above reasons and authorities, the Administrative Law Judge's findings that the Respondent maintains an improper no-solicitation/distribution rule, maintains various rules prohibiting employees from leaving their workstation without permission of management or engaging in interruptions of work, and that the Company's rule prohibiting bearing false witness were unlawful are unsupported in the record evidence and contrary to established Board decisions and must be reversed. Accordingly, the entire Complaint in this matter should be dismissed.

Respectfully submitted this the 14TH day of January, 2011.

Respectfully submitted,

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TONEY WILLIAMS, AN INDIVIDUAL

CERTIFICATE OF SERVICE

I, John S. Burgin, do hereby certify that I have this day served the foregoing **Brief in Support of Respondent's Exceptions to the Administrative Law Judge's Decision** upon the following persons:

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Dated this the 14TH day of January, 2011.

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